STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2005
v	No. 257103 Wayne Circuit Court
D'JUAN GARRETT, Defendant-Appellant.	LC No. 03-012254

Before: Whitbeck, C.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant D'Juan Garrett appeals as of right his bench trial convictions for assault with intent to commit murder[1] and possession of a firearm during the commission of a felony (felony-firearm).[2] The trial court sentenced Garrett to 15 to 30 years' imprisonment for the assault with intent to commit murder conviction and two years' imprisonment for the felony-firearm conviction. Garrett was acquitted of an additional charge of being a felon in possession of a firearm.[3] We affirm.

I. Basic Facts And Procedural History

A. Waiver Of Jury Trial

Garrett was charged with intent to commit murder, felony-firearm, and being a felon in possession of a firearm in connection with the shooting of Jamie McMann in Detroit in September 2004. Garrett was originally scheduled to have a jury trial before Wayne Circuit Judge Michael M. Hathaway. However, on the day Garrett's trial was scheduled to start, Judge Hathaway was still presiding over another continuing jury trial. Garrett was given the choice to be transferred to another court for a jury trial or have a bench trial with Judge Hathaway. It was proposed that if there were a bench trial, the parties would put their opening statements on the record that day and start the bench trial the next day. Garrett's attorney stated that he had spoken to Garrett without making any promises, and that Garrett preferred to stay with Judge Hathaway. Garrett was brought before Judge Hathaway, and the following exchange ensued:

[1] MCL 750.83.

[2] MCL 750.227b.

[3] MCL 750.224f.

The Court: And it's my understanding from what your lawyer just said that you wish to waive your right to a trial by jury and have a bench trial, is that correct?

Defendant: Yes.

The Court: Now you understand of course, in any kind of trial you have, you're presumed innocent until proven guilty beyond a reasonable doubt and it's the prosecutor's burden to prove you guilty beyond a reasonable doubt. But in a bench trial, or a waiver trial, I'm the only one making the decision, do you understand that?

Defendant: Yes.

The Court: There's no jury. If you had a jury trial, all twelve jurors would have to agree unanimously that you were guilty of the crime they found you guilty of, do you understand that?

Defendant: Yes.

The Court: All right, you're comfortable with a waiver trial?

Defendant: Yes.

The Court: All right, now has anybody promised you anything or threatened you or twisted your arm in any way to get you to give up your right to a jury trial?

Defendant: No.

The Court: And nobody's told you that I would be lenient with you if you waived your right to a jury trial and give you breaks or anything?

Defendant: No.

The Court: All right, you're waiving your rights freely and voluntarily?

Defendant: Yes.

The Court: This is your signature on the waiver of trial by jury form?

Defendant: Yes.

B. Court-Ordered Lineup

At a pretrial hearing, Garrett moved for an adjournment, in part, because he requested a court-ordered lineup. Garrett requested the lineup because he suspected witness coaching with regard to witness Jennifer Freund's identification of the shooter. The trial court denied the request for a lineup because Freund had already testified at the preliminary hearing that she knew Garrett before the shooting and, therefore, there was no reason for a lineup.

C. Waiver Of Witness

During the trial, the prosecution requested than Jamie McMann be waived as a witness. The prosecutor stated that he had spoken with McMann, and McMann had no independent recollection of the shooting. Garrett's attorney did not object to the waiver and stated that he too spoke with McMann, in the presence of McMann's mother, and that McMann indicated that he had no "information that would assist us with today's hearing."

II. Waiver Of Jury Trial

A. Standard Of Review

Garrett argues that his purported waiver of a jury trial was involuntary where he was forced to choose, on the day set for trial, between a bench trial in front of Judge Hathaway or a jury trial in front of another judge. We review the validity of a defendant's jury trial waiver for clear error.[4] A finding is clearly erroneous where, although there is evidence to support it, the court reviewing the entire record is left with a definite and firm conviction that a mistake has been made.[5]

B. Pretense

Garrett argues that Judge Hathaway's questioning of him regarding the waiver was a mere pretense and that Judge Hathaway was well aware that he had given Garrett the Hobson's choice of having a bench trial with him or a jury trial with Judge Townsend. Even if we accept that Garrett would have had to transfer to Judge Townsend's courtroom for a jury trial, Garrett has not established that being told to choose between a bench trial before Judge Hathaway and a jury trial before Judge Townsend effectively forced him to choose the bench trial. Garrett offers no explanation why his clear opportunity to choose to proceed with a jury trial before Judge Townsend was so unattractive or unacceptable an alternative as to render a bench trial his only real choice. The record shows that the questioning was sufficient to satisfy MCR 6.402, and we conclude that Judge Hathaway did not clearly err in finding that Garrett waived his right to a jury trial.

Further, the only time Garrett appeared to offer any explanation regarding why his waiver was a sham was in his second motion to remand, where he claimed that his counsel told him that he would receive a harsh sentence if he proceeded with a jury trial before Judge Townsend and, therefore, he was forced to waive his right to a jury trial. The defendant in *People v Gobold*[6] raised a similar claim. In that case, this Court held that the prospect of receiving a more lenient sentence if the right to a jury trial was waived is not the equivalent of an implied threat of punishment if the right to a jury trial is exercised.[7] The advice counsel gave the defendant in that

[4] *People v Taylor*, 245 Mich App 293, 305 n 2; 628 NW2d 55 (2001).

[5] *People v Walters*, 266 Mich App 341, 352; 700 NW2d 424 (2005).

[6] *People v Gobold*, 230 Mich App 508, 512-514; 585 NW2d 13 (1998).

[7] *Id*. at 513.

case was based on reality and it did not render a resulting bench trial involuntary or the product of coercion. Such advice instead allows a defendant to make an informed waiver.[8]

In the alternative, Garrett could be seen as making a claim, in his motion to remand, that Judge Townsend would, for some unexplained reason, have been unfair to him and that he was forced to waive his right to a jury trial in order to avoid Judge Townsend. Even if that was Garrett's claim, the record reflects that Judge Hathaway followed the proper procedure for the waiver of a right to a jury trial. We conclude that Garrett's mere allegation on appeal that his waiver was involuntary is not enough to show clear error, especially where he offers no evidence of any circumstances that could make his waiver involuntary under the law.

III. Court-Ordered Lineup

A. Standard Of Review

Garrett argues that he was denied due process of law when the trial court denied his motion for a corporeal lineup. The trial court's decision to deny a request for a lineup is reviewed for abuse of discretion. [9] A decision constitutes an abuse of discretion where it is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion and/or bias.[10]

B. The Exercise Of Discretion

"Michigan law permits a trial court to grant a defendant's motion for a lineup if the court chooses to do so in an exercise of its discretion."[11] In making its decision, the trial court should consider the benefits to the accused, the burden to the prosecution, police, courts, and witnesses, and the timeliness of the motion.[12] "A right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve."[13]

This Court has looked at a number of cases where the resolution of the issue depended on whether there was a reasonable likelihood of mistaken identification. In *People v Gwinn*, there was no reasonable likelihood of misidentification where the witness spent one to two hours with her attacker and where she had adequate light in which to observe him.[14] In *People v McAllister*, this Court also found that the time the witness spent with his attacker prior to the assault, a few minutes at best, was sufficient to ensure that there was not a reasonable likelihood of mistaken

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[8] *Id*. at 513-514.

[9] *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000).

[10] *Id*.

[11] *People v Gwinn*, 111 Mich App 223, 249; 314 NW2d 562 (1981).

[12] *Id*. at 249.

[13] *McAllister*, *supra* at 471.

[14] *Gwinn*, *supra* at 250.

identification.[15] In *People v Martin*,[16] this Court considered the prior relationship between the witness and the assailant, the situation where an assailant knew things only the defendant should know, the presence of voice identification, and the uncommon physical characteristics of the assailant in determining that there was not a reasonable likelihood of mistaken identification.

This Court has also, in making its determination, looked at the proximity of a victim to the perpetrator, any prior incidents between the witness and perpetrator, the accuracy of the description given by the witness, and any unique clothing characteristics.[17] One case in which the trial court did find that there was a reasonable likelihood of mistaken identification was where the witness only had a brief opportunity to observe the perpetrator, gave a limited description of the perpetrator, and had difficulty identifying the codefendants in the case.[18]

In this case, Garrett made a timely pretrial motion for a lineup. At the time of the motion, Garrett alleged that members of his family had observed evidence of witness coaching during Jennifer Freund's testimony at the preliminary examination. According to Garrett, at the preliminary examination, "a head nod was made when a question was asked by the prosecutor as to whether or not you could see the . . . shooter in the courtroom or not." Freund testified at the preliminary examination that she observed Garrett, whom she knew as "Gotti," cross the street, say, 'I told you so," and shoot McMann. Freund did admit to using cocaine the night before the shooting. The trial court denied the motion based on Freund's testimony that she knew Garrett as "Gotti." Based on Freund's knowledge and familiarity with Garrett before the shooting and the opportunity she had to observe him and hear his voice during the shooting, we conclude that the trial court had significant evidence on which to base its ruling that there was not a reasonable likelihood of mistaken identification in this case. We conclude that the trial court did not abuse its discretion by denying Garrett's motion for a lineup.

IV. Ineffective Assistance Of Counsel

A. Standard Of Review

Garrett argues that his trial counsel was ineffective because counsel waived McMann as a witness and denied him the right to confront his accuser. Garrett did not move for a new trial or an evidentiary hearing on this basis below. "Failure to so move forecloses appellate review unless the record contains sufficient detail to support his claims, and, if so, review is limited to the record."[19] Whether a person has been denied the effective assistance of counsel is a mixed

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[15] *McAllister*, *supra* at 471.

[16] *People v Martin*, unpublished opinion per curiam of the Court of Appeals, issued August 5, 2004 (Docket No. 247249).

[17] *People v Holly*, unpublished opinion per curiam of the Court of Appeals, issued February 9, 2001 (Docket No. 214795).

[18] *People v Fowler*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2005 (Docket No. 253103).

[19] *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

question of fact and constitutional law. We review the trial court's factual findings for clear error, while we review its constitutional determinations de novo.[20]

B. Legal Standards

To prevail on a claim for ineffective assistance of counsel, a defendant must make two showings. First, a defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, the defendant was denied his Sixth Amendment right to counsel.[21] Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.[22] Second, a defendant must show that the deficient performance prejudiced his defense.[23] "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different."[24] "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy."[25] "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight."[26]

C. Failure To Object

Here, Garrett's claim involves his trial counsel's failure to object to the prosecution's request to waive McMann as a witness. McMann was available to testify. The decision to waive McMann as a witness was a matter of trial strategy. McMann had no independent recollection of the shooting. Defense counsel came to that conclusion after speaking with McMann. Garrett's assertion on appeal that McMann had information relevant to the case is unsupported by anything in the record. We will not substitute our judgment for that of trial counsel's. We therefore conclude that Garrett cannot meet his heavy burden of showing that counsel was deficient under an objective standard of reasonableness and that trial counsel was effective.

V. The Waiver

A. Standard Of Review

Garrett argues that the trial court erred by allowing his counsel to waive the victim as a witness without his personal consent. An issue is not properly preserved if it is not raised before, addressed, and decided by the trial court.[27] Garrett did not raise this issue below and it is,

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[20] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[21] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

[22] *LeBlanc*, *supra* at 578.

[23] *Carbin*, *supra* at 600.

[24] *Id*.

[25] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[26] *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

[27] *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

therefore, unpreserved for appellate review. Unpreserved issues are reviewed for plain error affecting substantial rights.[28] "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights."[29] "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." The defendant bears the burden of persuasion with respect to prejudice.[30] Once a defendant satisfies the three requirements,

> an appellate court must exercise its discretion in deciding whether to reverse. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '"seriously affected the fairness, integrity, or public reputation of judicial proceedings[.]"'"[31]

B. The Confrontation Clause

The defendant must personally waive the more integral rights of the confrontation clause, including the right to cross-examination, the right to have a witness testify under oath, and the right to view a witness' demeanor.[32] The right of confrontation is, however, "not of such a moment that it requires waiver by the defendant personally when he is represented by counsel.[33] Therefore, even if a defendant does not personally waive his right to call a witness, defense counsel may validly waive it for him. We conclude that Garrett's constitutional rights were not violated when the trial court waived McMann as a witness via counsel and without Garrett's personal consent.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray

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[28] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[29] *Id*.

[30] *Id*.

[31] *Id*., quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 500 (1993), quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 2d 555 (1936).

[32] *People v Lawson*, 124 Mich App 371, 376; 335 NW2d 43 (1983).

[33] *People v Johnson*, 70 Mich App 349, 350; 247 NW2d 310 (1976).